Supreme Court, U.S.
FILED
DEC 14 1994
OFFICE OF THE CLERK

No. 94-860

In The

Supreme Court of the United States

October Term, 1994

L.E.S. PROPERTIES HOTEL VENTURE, L.P.,
A California limited partnership,

Petitioner,

vs.

WESTIN HOTEL COMPANY,
a Delaware corporation,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES H. DICK, JR.
BAKER & MCKENZIE
101 West Broadway, Twelfth Floor
San Diego, California 92101
Telephone: (619) 236-1441

Attorneys for
Westin Hotel Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the Constitution require that a trial judge look behind an **unambiguous** jury verdict to determine how the jury "really intended" damages should be computed?

2. Does the Constitution prohibit a trial judge from ruling as a matter of law that a plaintiff has failed to prove fraud by clear and convincing evidence?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATUTE INVOLVED 1

I. STATEMENT OF THE CASE 2

II. REASONS FOR DENYING THE WRIT 5

A. There Is No Constitutional Requirement For A Post Verdict Inquiry To Probe The "True Intent" Of An Unambiguous Jury Verdict 6

B. The District Court Was Correct in Ruling That The Plaintiff Failed To Prove Fraud By Clear And Convincing Evidence..... 14

III. CONCLUSION..... 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

U.S. Supreme Court

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 364 (1962) 10

Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed.2d 219 (1989) 14

McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915) 6

Federal Circuit Courts of Appeal

Attridge v. Cencorp, 836 F.2d 113 (2d Cir. 1987) 11

Chicago, Rock Island and Pacific Railroad Company v. Speth, 404 F.2d 291 (8th Cir. 1968) 7

Dickerson v. Pritchard, 706 F.2d 256 (8th Cir. 1983) 11

E.F. Hutton & Co., Inc. v. Arnebergh, 775 F.2d 1061 (9th Cir. 1985), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2248, 90 L. Ed.2d 694 (1986) 9

Guidry v. Kern Mfg. Co., 598 F.2d 402 (5th Cir. 1979) 11

Karl v. Burlington Northern Railroad Co., 880 F.2d 68 (8th Cir. 1989) 9

Lew Wenzel & Co. v. London Litho Supply Co., Inc., 563 F.2d 1367 (9th Cir. 1977) 15

McCullough v. Consolidated Rail Corp., 937 F.2d 1167 (6th Cir. 1991) 11

Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989) 6

TABLE OF AUTHORITIES – Continued

Page

Scott v. Plante, 641 F.2d 117 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1101, 102 S. Ct. 3474, 73 L. Ed.2d 1362 (1982), *pertinent grounds affirmed on remand by* 691 F.2d 634 (3d Cir. 1982) 14

Stanton v. Astra Pharmaceutical Products, Inc., 718 F.2d 553 (3d Cir. 1983) 11

Traver v. Meshriy, 627 F.2d 934 (9th Cir. 1980) 10

Federal District

Ferrante v. Metro-North Commuter R.R., 738 F. Supp. 106 (S.D.N.Y. 1990) 11

Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350 (N.D. Cal. 1993) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. Seventh Amendment 7

FEDERAL STATUTES

Federal Rule of Evidence 606 6

Federal Rule of Evidence 606(b) 1, 8, 9, 11, 16

Federal Rules of Civil Procedure 58(2) 7

Notes of Advisory Committee proposed Federal Rule of Evidence 606(b) 8

Notes to Federal Rule of Evidence 606(b) 8

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

Betts v. Allstate Insurance Co., 154 Cal. App.3d 688, 201 Cal. Rptr. 528 (1984) 15

Delos v. Farmers Ins. Group, Inc., 93 Cal. App.3d 642, 155 Cal. Rptr. 843 (1979) 16

DuBarry International, Inc. v. Southwest Forest Industries, Inc., 231 Cal. App.3d 552, 282 Cal. Rptr. 181 (1991) 14

Sierra National Bank v. Brown, 18 Cal. App.3d 98, 95 Cal. Rptr. 742 (1971) 14

Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa 195 (1866) 6

Woodward v. Leavitt, 107 Mass. 453 (1871) 6

STATE STATUTES

California Civil Code Section 3294 14

OTHER AUTHORITIES

Notes of Committee on the Judiciary, Senate Report No. 93-1277 8

No. 94-860

In The

Supreme Court of the United States

October Term, 1994

L.E.S. PROPERTIES HOTEL VENTURE, L.P.,
A California limited partnership,

Petitioner,

vs.

WESTIN HOTEL COMPANY,
a Delaware corporation,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTE INVOLVED

Federal Rule of Evidence 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on

the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

I.

STATEMENT OF THE CASE

This is a lawsuit between a sophisticated hotel developer – L.E.S. – and Westin Hotel Company, a hotel management company. In the Fall of 1988, the parties entered into a "Letter Agreement" that anticipated the negotiation of formal management agreements and contemplated Westin "promptly" would prepare a Preliminary Pro Forma projecting financial results for a proposed luxury hotel in San Diego. Westin was delayed in submitting its initial Pro Forma,[1] which caused the Developer to expend substantial money designing and preparing for construction of the hotel; when a correct Pro Forma finally was submitted in the Summer of 1989, the Developer was forced to abandon the project and incur a significant loss.

The Developer filed suit, and at trial L.E.S. sought damages based on a contention the Letter Agreement

---

[1] This statement of fact is made from a perspective that is most favorable to the Plaintiff. The "timeliness" issue was contested at trial and formed the basis for the entire lawsuit between the parties. While Westin contended it had performed its obligations under the Letter Agreement with due care, the jury found otherwise.

required that Westin provide an accurate Pro Forma sooner than it had done. Damages included avoidable out-of-pocket costs, as well as loss in the value of the real property on which the hotel was to have been constructed. The parties agreed on a specific form of verdict that required the jury to find for one of the parties on each of the various liability theories asserted and to determine what amount of damages, if any, had been caused by that wrongful act (*see*, Verdict attached as Appendix A).

Upon completion of the evidence at trial, Westin moved for judgment as a matter of law on the question of punitive damages, arguing that even though there might be sufficient evidence from which a jury could find by a ***preponderance of the evidence*** under California law that a fraud had been committed, there was insufficient evidence to prove an entitlement to punitive damages by ***clear and convincing evidence***. The trial judge took Westin's motion under submission and announced an intention to allow the jury's consideration of the punitive damages issue, despite the court's view that the Plaintiff had failed to prove a compelling case of fraud. The court said:

> I think this [Westin] was a legitimate, reputable company that made a mistake. There is evidence of negligence of course. I don't find any evidence that the April pro forma was given to L.E.S. with the intent of deceiving them. I think it was an honest mistake where they didn't get the April pro forma to them in time. I think the evidence is clear that the last pro forma, number 4, was given in an attempt to tell L.E.S. that Westin honestly felt that there was a change in

> conditions that they were not recommending that L.E.S. go ahead with the project.
>
> I don't have any problems with the award that was made; but I really have some real problems as to whether the evidence came even close to meeting the clear and convincing standard that's required for punitive damages. . . .

Reporter's Transcript of September 4, 1992, pp.56-57.

The jury found for the Plaintiff on the negligence, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, breach of contract, intentional misrepresentation and intentional concealment theories; it found for Westin on the breach of fiduciary duty theory. The jury's verdict included a different damage award for each of the theories on which liability was found, and the jury also found that the Developer should be entitled to punitive damages. The verdict was clear and unambiguous; a poll of the jury confirmed that the verdict was accurate, at which point the jury was excused and instructed to return the following day for deliberations on punitive damages.

The jury returned the next day, and after it had retired to consider punitive damages, the presiding juror submitted a question to the trial judge: "Are the damages that were awarded accumulative [sic]?" Over Westin's objection, the presiding juror was asked what was meant by the question, and she responded:

> We just want to make sure the damages awarded in each one of those counts – are those, at the end, cumulative? All the amounts that we added up – we had a certain figure that we were going to award? We wanted to make sure that

> we understand they were all cumulative damages.

Despite Westin's further objection, the jury then was asked the following Supplemental Special Interrogatory: "On your verdict dated September 3, 1992, did you intend to award L.E.S. the total of all claims, which is $5,570,250?" After deliberation, the jury responded in the affirmative.

The trial court entered judgment in the amount of $1.457 million on the negligent misrepresentation theory alone, plus attorney's fees, costs and litigation expenses. Westin moved for judgment as a matter of law, or in the alternative, new trial, based on the punitive damages award. The court ruled that fraud had not been shown by clear and convincing evidence, and judgment regarding punitive damages was entered in Westin's favor; the motion for new trial was denied as moot.

On appeal, the Court of Appeals for the Ninth Circuit rejected the arguments currently advanced in support of the Petition. A subsequent request for a rehearing was denied, and as no judge requested a vote, the petition for en banc review also was denied.

II.

REASONS FOR DENYING THE WRIT

This case has no business occupying the time of the Supreme Court for two reasons. **First**, in a belated attempt to reform a stipulated form of verdict, the Petitioner mistakenly advocates a constitutional right to determine a jury's "true intent," even though there never

was any ambiguity on the face of that jury's verdict. The Petitioner mistakenly would invite a post-verdict judicial exploration of the jury's mental processes, contrary to Federal Rule of Evidence 606. And given the facts of this case, there is no conflict in the decisions of the Circuits. **Second**, there is no need for this Court to second guess the trial judge and re-weigh the evidence on the question of punitive damages that the lower courts found insufficient to constitute clear and convincing evidence of fraud.

A. There Is No Constitutional Requirement For A Post Verdict Inquiry To Probe The "True Intent" Of An Unambiguous Jury Verdict.

Firmly grounded in our system of jurisprudence is the concept that a trial court must protect the mental processes of jurors from scrutiny, either by the court or the individual litigants. *E.g., Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195 (1866); *Woodward v. Leavitt*, 107 Mass. 453 (1871). This proposition was embraced in *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), when this Court articulated three reasons to exclude juror testimony. First, such testimony encourages post-trial harassment of the jurors. Second, it discourages open discussions within the jury room. Third, admitting such testimony interferes with the finality of litigation. *Id.* at 267-68.

Our jury system values finality in verdicts – a policy consideration that was examined in *Robles v. Exxon Corp.*, 862 F.2d 1201 (5th Cir. 1989). Although the face of the verdict form in *Robles* revealed consistent findings by the

jury, the trial court concluded that the jury had misunderstood the original instructions. Upon learning it had been the jury's true intent that the plaintiff recover some damages (in contradiction of the jury's original verdict), the trial court sent the jury back to reconsider its verdict. Judgment then was entered on a second verdict. In reversing and ordering judgment entered on the first verdict, the Court of Appeals succinctly stated the rule:

> Although the court may re-submit special interrogatories to a jury prior to discharge if the jury's original answers to the interrogatories are irreconcilably inconsistent, Rule 58(2) [of the Federal Rules of Civil Procedure] and the Seventh Amendment [of the Constitution] ***command that judgment be entered on the verdict if the jury's answers are clear and consistent.***

Id. at 1204 (emphasis added). *Robles* teaches that once a verdict is returned by the jury and a legally sustainable judgment can be culled from that verdict, it must be approved and judgment entered.

When post-verdict questioning necessarily would probe the jurors' deliberative processes, it is improper. Indeed, the jurors' intent is secondary and often must yield to paramount legal standards that may well conflict with what a jury intended. In *Chicago, Rock Island and Pacific Railroad Company v. Speth*, 404 F.2d 291 (8th Cir. 1968), the court said:

> To allow a judge to question a jury's process of deliberate decision, even though done in good faith to avoid an apparent miscarriage of justice, could result in abuses far outweighing the infrequent inability to correct what may *appear* to be, or is, erroneous or a misunderstanding. ***And this***

> ***must be true, even though reconsideration by the jury results in a verdict more accurately reflecting the jury's intentions.***
>
> . . . .
>
> It is well settled that the jury's misunderstanding of testimony, misapprehension of law, errors in computation or improper methods of computation, unsound reasoning or other improper motives cannot be used to impeach a verdict. These matters all inhere in the verdict itself.

Id. at 295 (second emphasis added).

The principles underlying the foregoing case authority were codified in Federal Rule of Evidence 606(b) which protects the privacy of jury deliberations. The Rule recognizes the need for finality to litigation and for jurors to engage in the full and free debate necessary for just verdicts. Otherwise, jurors would fear scrutiny of their deliberations in post-trial litigation. (Notes of Committee on the Judiciary, Senate Report No. 93-1277; Notes to Federal Rule of Evidence 606(b).) It is clear that "the mental operations and emotional reactions of jurors in arriving at a given result" are not to be used as a means of impeaching a verdict, even when juror testimony would show that the jury misunderstood the trial court's instructions. (Notes of Advisory Committee proposed Federal Rule of Evidence 606(b).)

Since the adoption of Rule 606(b), the vast majority of the courts interpreting the Rule have precluded juror testimony or submission of supplemental interrogatories to aid in understanding the jury's verdict. The limited exceptions exist when the verdict (i) is irreconcilably

inconsistent on its face or (ii) there has been a clerical error in filling out the verdict form.

In *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989), after the jury eventually returned an unambiguous verdict, the trial court resubmitted the damage award for clarification. On appeal, the judgment was reversed, because the resubmission had not been designed to clarify a clerical error, but instead was directed at the mental processes of the jurors. As such, it was in violation of Rule 606(b):

> The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the Court's instructions and concerns the jurors' full mental processes, which is forbidden by the rule.

Id. at 74-75.

Probing a clear, unambiguous verdict to determine "what the jury *really* intended" would not resolve doubts about the accuracy of the verdict; it only would question how the jury's decision was reached. That is precisely what Rule 606(b) forbids. The only exception is for "juror testimony concerning whether the verdict was affected by 'extraneous prejudicial information' or 'any outside influence.' " *E.F. Hutton & Co., Inc. v. Arnebergh*, 775 F.2d 1061, 1063-64 (9th Cir. 1985), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2248, 90 L. Ed.2d 694 (1986). The discipline of this

Rule has been applied with equal force to preclude post-verdict questioning of jurors:

> In general, jurors will not be heard to impeach their verdict . . . This means particularly that juror affidavits or testimony will not be received concerning the manner in which the jury arrived at its verdict. . . . Because a verdict may not be impeached on the basis of the jury's internal deliberations or the manner in which it arrived at its verdict, the practice of counsel in propounding questions on these subjects to jurors after trial should be discouraged.

Traver v. Meshriy, 627 F.2d 934, 941 (9th Cir. 1980) (citations omitted).

This Court has imposed no constitutional requirement for a post-verdict inquiry when a jury verdict is unambiguous and facially consistent. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 364 (1962), only stands for the proposition that "where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Id.* at 364. What the Petitioner seeks from this Court is an award of damages that differs from the various amounts indicated on the special verdict form, but unlike *Atlantic*, there was no inconsistent verdict to resolve. The jury went into its deliberations with a mutually agreeable, fully instructed verdict form, and it returned with a completed verdict that was facially consistent. The Petitioner's contention that the case at issue conflicts with previous decisions of this Court is incorrect.

Neither is there merit to the argument that there is a conflict in reported decisions of various Circuit Courts of

Appeals. The cases cited by the Petitioner are largely irrelevant to the matters at issue, and those authorities should be limited to their facts. Several of those decisions involve a verdict inconsistent on its face – a circumstance that is absent in this case. For example, *Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 576-77 (3d Cir. 1983), and *Guidry v. Kern Mfg. Co.*, 598 F.2d 402, 405 (5th Cir. 1979), each concerned clarification of facially inconsistent verdicts. Other decisions cited by the Petitioner concerned verdicts that were logically inconsistent and legally unsupportable. In *Dickerson v. Pritchard*, 706 F.2d 256, 259 (8th Cir. 1983), the court resubmitted a verdict that awarded punitive damages without also awarding compensatory damages.

The only authorities cited by the Petitioner that do not involve a facially inconsistent or legally unsustainable verdict are *Attridge v. Cencorp*, 836 F.2d 113 (2d Cir. 1987); *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991); *Ferrante v. Metro-North Commuter R.R.*, 738 F. Supp. 106 (S.D.N.Y. 1990).[2] These cases involved

---

[2] *Ferrante* followed *Attridge* reluctantly: "As adopted, Rule 606(b) expresses a preference for certainty and freedom from post verdict inquiries, even when it is manifestly clear that the jury did not understand or follow the court's charge. The Rules Committee certainly must have realized that such an approach would work some hardships, but, as adopted, Rule 606(b) reflects the reasoned judgment of the Committee that this was a necessary result. . . . Nevertheless, *Attridge* controls this court's actions. Under that case, the court is permitted to take notice of a jury's unanimous post-discharge statement that it did not intend the court to follow previously announced procedures concerning the reduction of an award. In light of the criticism of *Attridge*, the court has considered whether it should be limited to the specific facts of that case." *Id.* at 109.

personal injury claims in which the jury assigned a portion of fault to the plaintiff and proceeded to award damages. After the verdict was announced, in each case the trial court inquired whether the amount on the verdict form was the total amount of damages yet to be reduced by the plaintiff's comparative negligence, or had the amount already been reduced. Because the jurors in those cases indicated that their decision was contrary to the court's instructions and already reflected a reduction by the percentage of fault, the court proceeded to enter judgment on a mathematically increased amount. Each of those cases involved verdicts with potentially ambiguous findings, but once a carefully limited question was asked, the intended verdicts were clear. None of these cases involved probing the underlying rationale by which the jury had arrived at its assessment of the actual damages.

None of the cases on which the Petitioner relies involved reapportioning damages between multiple liability theories. None required extensive questioning of jurors about the rationale for their complex, yet facially consistent verdict. To the contrary, the Petitioner's cases only involved apparent jury misunderstanding with regard to one special interrogatory in the original verdict form, and the decisions avoid intrusion into the methodology by which the jury had assigned its multiple damage awards. Limited to their facts, these cases do not present any notable conflict in controlling decisions of various Circuits.

The Petitioner's case law notwithstanding, this lawsuit does not present any issue that warrants further review. There never was any verdict ambiguity in the first place. It is clear that the jury found L.E.S. was damaged

in the amount of $1.457 million based on Westin's negligent misrepresentations about the Pro Forma's projections, $1.444 million for Westin's breach of the Letter Agreement's obligation to provide the Pro Forma "promptly," $375,000 for Westin's negligent delay in providing the Pro Forma, and so on. The jury's intent beyond that is not clear, even after the objectionable Special Interrogatory was answered.

When the jury's answer to the Special Interrogatory is considered, it appears that the jury mistakenly thought the law ought to allow the Developer to receive the aggregate of the individual damage awards, but there is nothing that compels a conclusion that the jury first had computed the total award and then broke it into smaller pieces that were allocated to each liability theory. It is just as reasonable to speculate that the jury did what it was instructed to do – calculate what damage was caused by negligence, what damage was the result of a contractual breach and so forth – and then totalled the individual awards, incorrectly thinking that multiple recovery should be permitted.[3] If that is what the jury had in mind (and we shall never know to a moral certainty what the jurors really intended), then to aggregate the several damage awards would be to award the Plaintiff multiple

---

[3] For example, if after returning its original verdict the jury was told one of the six counts on which liability was found had been dismissed, would the jury have asked to reapportion the $5.57 million among the remaining counts, or would it have asked to "re-accumulate" the remaining damage figures to arrive at a new, lesser award amount? Obviously, neither the litigants nor the Court can answer this question with any certainty.

recoveries for the same wrong merely because it was able to characterize the wrongdoing six different ways. This simply is not permitted. *DuBarry International, Inc. v. Southwest Forest Industries, Inc.*, 231 Cal. App.3d 552, 282 Cal. Rptr. 181 (1991).

B. The District Court Was Correct in Ruling That The Plaintiff Failed To Prove Fraud By Clear And Convincing Evidence.

When jurisdiction is founded on diversity, state substantive law governs the circumstances justifying the award of punitive damages, and federal law governs review of the jury award by the trial and appellate courts. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 278-79, 109 S. Ct. 2909, 106 L. Ed.2d 219 (1989). If the evidence is too sparse to support punitive damages, as a matter of law, an award of exemplary damages should not stand. *E.g., Scott v. Plante*, 641 F.2d 117, 135 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1101, 102 S. Ct. 3474, 73 L. Ed.2d 1362 (1982), *pertinent grounds affirmed on remand by* 691 F.2d 634 (3d Cir. 1982). Indeed, a trial court may set aside a jury verdict supported by a prima facie case when that verdict is contrary to the **clear weight** of the evidence. *E.g., Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1373 (N.D. Cal. 1993).

This whole issue arises because controlling California law permits recovery of compensatory damages for fraud upon proof by a preponderance of the evidence. *E.g., Sierra National Bank v. Brown*, 18 Cal. App.3d 98, 104-06, 95 Cal. Rptr. 742, 746 (1971). However, California Civil Code section 3294 provides that punitive damages only

may be awarded "where it is proven by **clear and convincing evidence** that the defendant has been guilty of oppression, fraud or malice. . . . " (emphasis added). The trial court correctly applied these different legal standards.

The Petitioner asks the Court to revisit the facts and determine if the trial judge was correct in ruling as a matter of law that there had been a failure to prove fraud by clear and convincing evidence. The trial judge heard the evidence, listened to the witnesses, weighed their credibility and concluded that the evidence fell far short of meeting the standard required for punitive damages. Whatever negligence there may have been, this was not a case of Westin intending to "vex, injure or annoy" anybody. *See, e.g., Betts v. Allstate Insurance Co.*, 154 Cal. App.3d 688, 709, 201 Cal. Rptr. 528 (1984). The Court of Appeals concurred with that assessment of the evidence, and this is not an issue that warrants Supreme Court attention.

Even if there had been sufficient evidence of fraud to satisfy a clear and convincing standard, the fact remains that L.E.S. sued and recovered on multiple theories, some of which permit recovery of punitive damages, some of which do not. While a plaintiff is entitled to plead and prove multiple theories based on the same set of facts, it ultimately must elect a single theory on which to have judgment entered. The theory chosen must legally support recovery of punitive damages. *Lew Wenzel & Co. v. London Litho Supply Co., Inc.*, 563 F.2d 1367 (9th Cir. 1977).

Judgment in this matter was entered on a negligent misrepresentation claim which did not support an award

of punitive damages. *Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App.3d 642, 155 Cal. Rptr. 843 (1979). The jury did find for the Plaintiff on the intentional misrepresentation and intentional concealment theories – the only claims on which the liability findings will support punitive damages – but the actual damages attributable to those theories of wrongdoing were less than the damages caused by negligent misrepresentation, so it was understandable that judgment was entered on the negligent misrepresentation count. However, L.E.S. cannot have judgment for the largest damage award and eat its cake too.

III.

CONCLUSION

There is no reason to grant the Petitioner's request for a Writ of Certiorari. Given that the verdict in this case was on an agreed form and was unambiguous as returned by the jury, settled case law and Federal Rule of Evidence 606(b) proscribe the temptation to reach behind the verdict and inquire *how* or *why* the jury arrived at its damages award. The sanctity of the jury's thought processes should be preserved. Further, the trial judge was in the best position to determine whether there was clear and convincing evidence of fraud sufficient to support an award of punitive damages. There is no reason to plow that ground again. This Petition for Writ of Certiorari should be denied.

DATED: December 14, 1994

Respectfully Submitted,

BAKER & MCKENZIE
CHARLES H. DICK, JR.
Attorneys for Westin Hotel Company

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

L.E.S. PROPERTIES HOTEL VENTURE, L.P., a California limited partnership, Plaintiff, v. WESTIN HOTEL COMPANY, a Delaware corporation, Defendant.	CIV 89-1466 ACM (M) V E R D I C T

(You are to assess the total damages as to each of the Claims. Plaintiff, however, is entitled to one recovery, which is to be determined by the Court.)

We the jury, being duly empaneled, Find as follows:

1. NEGLIGENCE CLAIM

In favor of the Plaintiff L.E.S. Properties (L.E.S.)

YES X NO _____

If NO, go to next Claim.

If YES, what is the total amount of damages to which L.E.S. is entitled [without any reduction for L.E.S. contributory negligence]?

$ 375,000

Was L.E.S. contributorily negligent?

YES X NO _____

If YES, what proportion or percentage is attributable to L.E.S. and Westin of the total combined negligence of the parties?

L.E.S. 25% Percent Westin 75% Percent

2. **BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

In favor of the Plaintiff L.E.S.

YES X NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 500,000

3. **BREACH OF CONTRACT**

In favor of the Plaintiff L.E.S.

YES X NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 1,444,000

4. **BREACH OF FIDUCIARY DUTY**

In favor of the Plaintiff L.E.S.

YES _____ NO X

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ _____

5. **NEGLIGENT MISREPRESENTATION**

In favor of the Plaintiff L.E.S.

YES X NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 1,457,000

6. INTENTIONAL MISREPRESENTATION

In favor of the Plaintiff L.E.S.

YES ___X___ NO _____

If NO, go to next Claim.

What is the total amount of damages to which L.E.S. is entitled?

$ 944,000

7. INTENTIONAL CONCEALMENT

In favor of the Plaintiff L.E.S.

YES ___X___ NO _____

If NO, go to Punitive Damages.

What is the total amount of damages to which L.E.S. is entitled?

$ 944,000

A-3

BEST AVAILABLE COPY

PUNITIVE DAMAGES

Is L.E.S. entitled to recover punitive damages from Westin?

YES X NO _____

DATED: 9/7/92

Denise R. Garrett
FOREPERSON